

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

DEC 19 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0388
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
JOHN DOUGLAS ELAM,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071117

Honorable Barbara C. Sattler, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, John Elam was convicted of possession of a dangerous drug and possession of drug paraphernalia. The trial court suspended imposition of sentence and imposed twelve months' probation. On appeal, Elam contends the trial court erred in giving an erroneous jury instruction and in denying his motion for a new trial urging that the verdict was against the weight of the evidence. Because the trial court did not err, we affirm.

Jury Instruction

¶2 Elam first argues that the trial court erred in instructing the jury on the elements of possession of a dangerous drug because the instruction did not require the jury to find that Elam knew the amount of drugs he possessed was usable. Because Elam failed to raise this issue below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Id.*, quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). To prevail under the fundamental error standard of review, Elam bears the burden of showing “both that fundamental error exists and that the error in his case caused him prejudice.” *Id.* ¶ 20.

¶3 Proof of a “usable quantity” of drugs is “neither an element of . . . possession [of a dangerous drug] . . . nor necessary to sustain a conviction for it.” *State v. Cheramie*, 218 Ariz. 447, ¶ 21, 189 P.3d 374, 378 (2008); *see also* A.R.S. § 13-3407. Accordingly, the state was not required to prove that Elam possessed a usable amount of drugs. *See Cheramie*,

218 Ariz. 447, ¶ 22, 189 P.3d at 378. Consequently, the state also was not required to prove that Elam knew the amount of drugs he possessed was usable. The trial court's jury instruction on the elements of possession of a dangerous drug did not constitute error, much less fundamental error.

Motion for New Trial

¶4 Elam also contends the trial court abused its discretion when it denied his motion for a new trial made pursuant to Rule 24.1, Ariz. R. Crim. P. Specifically, Elam argues the court improperly applied the Rule 20 standard in determining his new-trial motion. We will not disturb a trial court's denial of a Rule 24.1 motion absent an abuse of discretion. *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996).

¶5 When ruling on a motion for new trial, the trial court weighs evidence and “consider[s] the credibility of witnesses.” *State v. Tubbs*, 155 Ariz. 533, 535, 747 P.2d 1232, 1234 (App. 1987). The trial judge “sits as a thirteenth juror, and [s]he, as well as the jury, must be convinced that the weight of the evidence sustains the verdict, or it is h[er] imperative duty to set [the verdict] aside.” *State v. Thomas*, 104 Ariz. 408, 412, 454 P.2d 153, 157 (1969), quoting *Brownell v. Freedman*, 39 Ariz. 385, 389, 6 P.2d 1115, 1117 (1932). But motions for new trial “are disfavored and should be granted with great caution.” *Spears*, 184 Ariz. at 287, 908 P.2d at 1072, quoting *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988). And it is “well settled” that “[i]f an examination of the record discloses that no mistake of law or fact was made and that the evidence fully

sustains the conviction, it is an abuse of discretion to grant a new trial.’” *State v. Moya*, 129 Ariz. 64, 66, 628 P.2d 947, 949 (1981), *quoting State v. Jones*, 120 Ariz. 556, 559, 587 P.2d 742, 745 (1978).

¶6 In contrast, in deciding a Rule 20 motion, a court determines only whether substantial evidence supports the conviction. Ariz. R. Crim. P. 20. Substantial evidence is “that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.” *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). The trial judge gives “full credence to the right of the jury to determine credibility, weigh the evidence and draw justifiable conclusions therefrom.” *Tubbs*, 155 Ariz. at 535, 747 P.2d at 1234, *quoting State v. Clifton*, 134 Ariz. 345, 348, 656 P.2d 634, 637 (App. 1982).

¶7 Here, the court stated it was “not convinced [that Elam possessed] a usable amount” of drugs and “if Mr. Elam had . . . [his case] tried to the bench, he would have been acquitted.” Accordingly, under Rule 24.1, the trial court should have granted a new trial because it did not believe the weight of the evidence sustained the verdict. *See Thomas*, 104 Ariz. at 412, 454 P.2d at 157 (trial court has duty to grant motion for new trial if convinced evidence does not sustain verdict). But, as we have already explained, proof of a “usable quantity” of drugs is “neither an element of . . . possession [of a dangerous drug] . . . nor necessary to sustain a conviction for it.” *Cheramie*, 218 Ariz. 447, ¶ 21, 189 P.3d at 378. Therefore, the trial court’s opinion of the weight of the evidence on this issue is irrelevant to Elam’s guilt. The jury’s guilty verdicts were not the result of any mistake of law or fact

and were not against the weight of the relevant evidence. Accordingly, despite the trial court's statements, it did not abuse its discretion when it denied Elam's motion for a new trial. *See State v. Canez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002) ("[W]e are obliged to uphold the trial court's ruling if legally correct for any reason.").

Conclusion

¶8 In light of the foregoing, we affirm Elam's convictions.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge